In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 292

HAL R. COX AND ALYCE LEE COX, FLOYD CALDWELL AND W. A. ABERNATHY; CHARLES J. MAPEL; MARY COE BLEVINS, PETITIONERS

v.

UNITED STATES OF AMERICA

R. E. BEASLEY, ELSIE S. BEASLEY AND SARAH VIRGINIA BEASLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (R. 1-7),[1] with a

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[1] The record in this Court is in three individually paginated sections, i.e., the record in C.A. 10, No. 4148, *Hal R. Cox, et al.*

dissenting opinion by Judge Phillips (R. 7-13), is reported at 190 F. 2d 293.

JURISDICTION

The judgments of the Court of Appeals were entered June 21, 1951 (R. 13-14). A petition for rehearing was filed July 19, 1951 (R. 15-17), and denied July 31, 1951 (R. 18). The petition for a writ of certiorari was filed August 30, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether just compensation for lands used as a cattle ranch in conjunction with adjacent public lands can be measured by the carrying capacity of the entire unit, including the public lands, when the public lands were used in the unit pursuant to a revocable permit.

2. Whether the availability of the public lands could be considered in determining the adaptability of private lands as base land for a cattle ranch when the permit for use of the public lands was revoked coincidentally with the taking of the private lands.

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v. *United States;* the record in C.A. 10, No. 4201, *R. E. Beasley, et al.* v. *United States;* and the record of the proceedings in both cases in the court of appeals. In this brief, references to the records in the individual cases will be indicated by (R. —, No. 4148) or (R. —, No. 4201), as the case might be. References to the proceedings in the court of appeals will be indicated simply (R. —).

STATUTES INVOLVED

1. Section 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315b, provides:

> * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

2. The Act of July 9, 1942, 56 Stat. 654, as amended by the Act of May 28, 1948, 62 Stat. 277, 43 U.S.C. 315q, provides:

> Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States.

STATEMENT

The United States, on April 3, 1945, instituted a proceeding, Civil No. 834, to condemn the exclusive use of 556,032 acres of land in Dona Ana and Otero Counties, New Mexico, for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the national emergency, for use in connection with the White Sands Proving Grounds, Fort Bliss area (R. 3-7, 18, No. 4148; R. 1-5, No. 4201). The lands were described by exterior boundaries (R. 4-5, No. 4148; R. 3-4, No. 4201), and consisted for the most part of public lands for which private individuals held grazing permits under the Taylor Grazing Act for use in connection with ranching operations on adjacent lands owned in fee or leased from the State of New Mexico (R. 88-90, 285-286, 322-323, 337, 350, No. 4148; R. 33, 62-66, No. 4201).[2] The Government had previously leased privately owned lands in the area by co-use agreements under which the ranchers used the lands for grazing and the Government used the area as a gunnery range (R. 110, 120, No. 4148; R. 85-86, 95, 102-103, No. 4201). The term of the temporary taking was duly extended to cover the years ending June 30, 1946, and June 30, 1947 (R. 7-9, No. 4148; R. 6-9, No. 4201). However, it was subsequently determined that it would be necessary and

[2] As an example, the Cox ranching unit was composed of 1,611 acres of federal lands under permit, 920 acres leased from the State, and 230 acres owned in fee (R. 196, 285-286, No. 4148). In fact, the percentage of federal lands in the various ranch units ranged from 60% to more than 85%.

advantageous to acquire most of the lands in fee, and on October 16, 1946, Civil No. 1149 was filed, covering in general the same lands included in Civil No. 834, to condemn the fee title to 427,-120.98 acres (R. 34-39, No. 4148; R. 29-34, No. 4201). The lands involved in this proceeding were likewise described by exterior boundaries (R. 35-37, No. 4148; R. 30-32, No. 4201), but the petition referred to the fact that a large portion of the lands was federally owned and stated that the Government did not admit the existence of any rights in such public lands in favor of any of the named defendants (R. 38, No. 4148; R. 33, No. 4201). Subsequently, an amended petition was filed in Civil No. 834 to show that the temporary taking of the lands also involved in Civil No. 1149 was for a term of years ending October 16, 1946 (R. 17-24, No. 4148; R. 16-25, No. 4201). Ever since the filing of Civil No. 834 in 1945, the Government has been in exclusive possession of the lands here involved (R. 5, 72, No. 4148; R. 98-99, 103, No. 4201).

Petitioners here are the owners of five ranches which were thus taken, at first temporarily and then permanently, *i.e.,* the Beasley, Cox, Caldwell, Blevins and Mapel ranches. Declarations of taking were filed and deposits of estimated just compensation made at various times prior to trial, except that no declarations were filed or deposits made in connection with the temporary takings of the Cox and Mapel ranches (R. 9-13, 24-26, 39-42,

44-50, 52-54, No. 4148; R. 9-12, 35-37, No. 4201). Commissioners returned awards substantially in excess of the deposits (R. 26-27, 29-30, 62-63, 65-67, No. 4148; R. 25-26, 40, No. 4201), and the United States appealed from orders confirming the awards and demanded trial by jury (R. 28-29, 31, 32-33, 64-65, 68, 69-70, No. 4148; R. 27-28, 41-43, No. 4201).

At a pretrial conference one of the questions taken up was whether the public domain, for which petitioners held grazing permits, should be taken into consideration in determining the value of the lands condemned (R. 90, No. 4148). It was the Government's position that compensation for the lands taken should be made without regard to the use of the public lands, and that the ranchers' only recourse for loss of grazing privileges was under the Act of July 9, 1942, 56 Stat. 654, 43 U.S.C. 315q, *supra,* p. 3, providing for an administrative determination as to the amount of payment for such loss (R. 94-95, 102-103, No. 4148). On the other hand, petitioners contended that, in view of the governmental policy in permitting use of the public lands for grazing and the practice among ranchers of valuing ranches for purposes of sale by the carrying capacity of the ranch unit, including the public domain, they were entitled to the added value resulting from the adjacent public lands (R. 90-91, 99-102, 103-104, No. 4148). The court agreed with petitioners' contention and issued pre-trial orders in each case providing that in

arriving at the rental value and fee value of the property taken "the jury will be instructed that it will take into consideration the carrying capacity of each respective ranch, irrespective of the type and character of the ownership or the title under which or the right to use which, each such ranch is held, and any other factor which may and is usually used and considered between private individuals" in leasing or buying and selling such ranches (R. 73-74, No. 4148). The Government took exception to each of the orders (R. 73-74, No. 4148).

Pursuant to agreement reached at the pre-trial conference, Civil Nos. 834 and 1149 were consolidated for trial (R. 112-113, 116, No. 4148). The just compensation for the Beasley ranch was the subject of a separate trial (R. 97, No. 4201), while the other four ranches were tried together (R. 122, No. 4148). Consistently with the pre-trial orders, witnesses for the ranchers were permitted to value the various ranches as units by multiplying the carrying capacity of the ranch unit, including the public lands, by the estimated animal unit value (which was the estimated net profit from the sale of a calf and was approximately $150.00, according to the ranchers' witnesses), and adding to the product thus obtained the value of improvements (R. 124-132, 134, 153, 165-166, 189, 211-212, 223-225, 244-245, 255, No. 4148; R. 115, 118, 125-126, 139, No. 4201). Witnesses for the Government testified as to values, following the same method of valua-

tion, but using a lower animal unit value, and also valued the property taken by determining the contributory value of the fee and State lands to the unit as a whole on the basis of an apportionment of the carrying capacity (R. 289-290, 325-326, 338-339, 350-351, 369, 378-382, No. 4148; R. 161-163, No. 4201).

The jury was instructed to the effect that the Government was taking only the fee land and that it should determine only the value of such land, but was told that, in doing so, it could take into consideration as an element of value the accessibility and availability of the lands covered by the grazing permits (R. 389, No. 4148; R. 115-116, 139-140, 175-176, No. 4201). There were no exceptions to the instructions as given, and in fact instructions requested by the Government under pressure of the pre-trial order were similar in substance (R. 77, No. 4148; R. 177, No. 4201). The jury verdicts were in amounts substantially in excess of the deposits (R. 74-75, No. 4148; R. 47, No. 4201), and the Government appealed from the judgments entered thereon (R. 77-82, No. 4148; R. 47-56, No. 4201).

The two appeals (No. 4148, *Cox, et al.,* and No. 4201, *Beasley*) were consolidated for hearing (R. 1), and on June 21, 1951, judgments were entered, reversing the judgments and remanding for further proceedings in accordance with the views expressed in the opinion of the court (R. 13-14).

The court of appeals held that, inasmuch as the grazing permits were not an interest protected by the Fifth Amendment, it was improper to determine just compensation by the value of the ranches as units, including the public lands under permit, even though the ranchers customarily bought and sold on the basis of the carrying capacity of the entire unit (R. 4-6). The court of appeals also laid down the rule that the existence of the grazing permits or, in other words, the availability and accessibility of the public lands could be considered in determining the adaptability of the private lands as base lands for cattle ranches and that the effect of such adaptability on market value was a proper element in determining just compensation, provided that consideration was also given to the possibility that the permits could be revoked by the Government at any time without any constitutional obligation to pay compensation therefor (R. 6; see also *United States* v. *Jaramillo,* 190 F. 2d 300, 302 (C.A. 10), decided on the same day). However, it was held that, inasmuch as the grazing permits here involved had been effectively revoked coincidentally with the taking of the private lands (R. 5), the public lands were no longer available and accessible for grazing purposes, and, hence, could not be considered in determining the value of the private lands (R. 6).

Judge Phillips agreed that the ranches could not be valued as an economic unit, and that there-

fore the judgments should be reversed (R. 7-13). However, he was of the view that the permits had not been effectively revoked at the time of taking (R. 8), and dissented on the ground that at the new trial the grazing permits should be considered in determining the adaptability of the private lands for cattle ranches in accordance with the principles established in the court's decision in *United States* v. *Jaramillo,* 190 F. 2d 300 (C.A. 10) (R. 7, 10-13).[3]

Petitioners filed a petition for rehearing (R. 15-17), which was denied on July 31, 1951 (R. 18).

ARGUMENT

1. Under the economic unit theory of valuation espoused by petitioners and adopted by the district court, two ranch units having the same carrying capacity would have the same market value in condemnation even if one unit were composed entirely of privately owned lands and the other were made up of 100 acres of privately owned lands and 10,000 acres of federal domain. Such a theory is patently erroneous in logic and without support

[3] In the *Jaramillo* case the Government, taking private lands adjacent to a national forest, did not interfere with grazing in the forest, and in fact Jaramillo was granted a new grazing permit after his private lands were taken. Under these circumstances, the court reversed a judgment reflecting a separate valuation for the grazing permit, but held that in determining the adaptability of the Jaramillo lands as a ranch, it was proper to take into consideration the availability of the permit land in the forest, provided that consideration were also given to the possibility that the permit could be withdrawn by the Government at any time. 190 F. 2d 300, 302 (C.A. 10).

in law. Petitioners had no compensable interest in the public lands by virtue of their grazing permits, which could be revoked at will by the sovereign without liability. Section 3, Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. 315b; *Osborne* v. *United States,* 145 F. 2d 892, 894, 896 (C.A. 9); *Oman* v. *United States,* 179 F. 2d 738, 741-742 (C.A. 10). Hence, even though their grazing rights were of great value in dealings with private individuals, they had no right to compensation therefor when their fee lands were taken by the Government. *Osborne* v. *United States,* 145 F. 2d 892 (C.A. 9); cf. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 70, 74-76; *Louisville Bridge Co.* v. *United States,* 242 U.S. 409; *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U.S. 592; *United States* v. *Willow River Co.,* 324 U.S. 499, 510; *United States* v. *Honolulu Plantation Co.,* 182 F. 2d 172, 175 (C.A. 9), certiorari denied, 340 U.S. 820. And it is immaterial that in buying and selling ranch units ranchers customarily determine price by the carrying capacity of the entire unit, including the public lands. Obviously, the ranchers are buying and selling something more than fee lands, *i.e.,* the qualified right to carry on a business on the public lands. Such an element must be eliminated from the criterion of market value in a condemnation case. Cf. *United States* v. *Miller,* 317 U.S. 369, 375; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281-283; *United*

States v. *Cors*, 337 U.S. 325, 332-334. Clearly, the court below was correct in rejecting the economic unit theory of valuation (R. 4-6).

2. Neither did the court below err in holding that the public lands could not be considered in determining the adaptability of the fee lands as base lands for cattle ranches (R. 6). Before it can be said that adjacent public lands would have any effect on the market value of the fee lands as cattle ranches, it must appear reasonably probable that the public lands would be available for use in connection with the fee lands. *Olson* v. *United States*, 292 U.S. 246, 255-257; *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 275-276; *Iriarte* v. *United States*, 157 F. 2d 105, 111 (C.A. 1), certiorari denied, 335 U.S. 816. Such is not the case here. As far back as 1941, the Government had begun reclaiming the public lands in the general area for military use, so that the threat of the establishment of additional projects in the area had affected the selling price of ranches on the economic unit basis (R. 310, 313-316, 333-334, No. 4148). In 1945, the Government had taken over exclusive possession of the very public lands here involved on a temporary basis (R. 5, No. 4148). Thus, when it was determined that the private lands should be taken in fee (R. 34, 37, No. 4148), there was not even a remote possibility that the public lands would be available for use in connection with ranching operations on the private lands.

Petitioners' rights to graze on the public lands had been effectively terminated (R. 5).[4] The United States had reclaimed its own public lands, and was obliged to pay for the private lands taken, but without consideration of the discontinued right to make use of public lands.

3. Contrary to the position taken in the dissenting opinion (R. 9-12), this is not a case for application of the rule that in determining value of land taken no consideration should be given to an increase or decrease resulting from the project for which the land was taken. Cf. *United States* v. *Miller,* 317 U.S. 369, 376-377. No claim is made that the Government should receive the benefit of any decrease in value which might result from the fact that the lands taken were in the midst of a rocket range. The only claim is that the revoked right to use the public lands for grazing should not be considered in determining the value of the

[4] Judge Phillips was of the view that the grazing permits had not been revoked because the Secretary of the Interior had not issued a formal order to that effect (R. 8). However, no particular form is necessary for the withdrawal or reservation of public lands. *Wolsey* v. *Chapman,* 101 U.S. 755, 769-770; *Wilcox* v. *McConnel,* 13 Pet. 498, 512-513. Even between private parties, a bare license, such as here involved (*Osborne* v. *United States,* 145 F. 2d 892, 895-896 (C.A. 9)), may be effectively revoked by any act on the part of the licensor indicating an intention to revoke, as when he makes its exercise impossible. *Geophysical Exploration Co.* v. *Klodginski,* 61 F. 2d 849, 850 (C.A. 5), certiorari denied, 288 U.S. 608; *Chavez* v. *Torlina,* 15 N. Mex. 53, 65, 99 Pac. 690. Plainly, when the United States took over exclusive control of its lands, all permits to graze thereon were effectively canceled.

fee lands. It is conceded that, just as in the example cited by the dissenting judge (R. 11-12), property owners are entitled to any enhancement inhering in their property from favorable environment. But this does not include a spurious enhancement flowing from a bare license to use adjoining land. Just as here, the property owner in the hypothetical case would not be entitled to increased compensation because he had a license to sell refreshments in the public school or park.

4. The decision of the court of appeals is clearly correct and there is no conflict. Since the questions here presented have been decided with unanimity by the circuits in which the bulk, if not all, of the cases involving the questions would arise,[5] there should not be any uncertainty as to the measure of compensation in such cases. And any hardship resulting to the ranchers has already been alleviated by Congress when it passed the Act of July 9, 1942, 56 Stat. 654, 43 U.S.C. 315q, providing for an administrative determination as to the payment to be made to a rancher for the losses suffered when public lands for which he had held a grazing permit were used for war or defense purposes.

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[5] Grazing districts under the Taylor Grazing Act have been established only in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Wyoming (43 C.F.R. (Cum. Supp.) sec. 502.1), all of which States are included in the Ninth or Tenth Circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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